DELTA DRIVE (M) SDN BHD

v.

HONG LEONG FINANCE BHD (NO 2)

HIGH COURT MALAYA, JOHOR BAHRU
SULONG MATJERAIE JC
[COMPANIES WINDING-UP NO: 28-238-1998 (NO 2)]
23 JUNE 2000

COMPANY LAW: *Winding-Up - Stay of proceedings - Application for - Whether director can apply for stay - Whether director a contributory - Companies Act 1965, s. 243(1)*

CIVIL PROCEDURE: *Affidavits - Contents - Address of deponent - Business address - Failure to comply with O. 41 r. 1(4) Rules of the High Court 1980 - Whether provision mandatory*

CIVIL PROCEDURE: *Affidavits - Contents - Exhibits - Whether document annexed to affidavit - Rules of the High Court 1980, O. 49 r. 11 - Application of rule*

The respondent filed an application by way of a summons-in-chambers (SIC) for the winding-up order made against it be stayed pending appeal. The counsel for the petitioner raised several preliminary objections *ie,* (i) the respondent's application was irregular as it should be made by way of a notice of motion pursuant r. 7(1) Companies (Winding-Up) 1972; (ii) the supporting affidavit to the application was contrary to s. 243(1) Companies Act 1965; (iii) the supporting affidavit failed to comply with O. 41 rr. 1(4) & (11) Rules of the High Court 1980 (RHC); and (iv) the director of the respondent could not represent the respondent in an application for stay of the winding-up order.

Held:

[1] The instant application for a stay of the winding-up order by summons-in-chambers was proper. The case of *Re Sin Teck Hong Oil Mills Ltd.* was distinguished as it concerned an application to confirm the appointment of a liquidator and furthermore, it was decided before the Companies (Winding-up) Rules 1972 came into force.

[2] After an order of winding-up has been made, the application for stay of all proceedings relating to the winding-up may be made only by a liquidator or a creditor or a contributory. Therefore, unless the applicant

is a liquidator or a creditor, it would be prudent to affirm in the supporting affidavit that he is a contributory in order to comply with s. 243(1) Companies Act 1965.

[3] Although the document was not exhibited under para. 27 of the supporting affidavit, it was exhibited under exh. "N13" and "N14" under the respective paras. 28 and 29. Therefore, in reality the document was annexed to the affidavit within the meaning of O. 49 r. 11 RHC.

[4] There was a clear non-compliance of the mandatory O. 41 r. 1(4) RHC as the address of the deponent in the supporting affidavit was not his residential address. The affidavit therefore could not be accepted and the SIC ought to be dismissed for it had no supporting affidavit.

[Preliminary objections upheld, respondent's application dismissed.]

Case(s) referred to:
Re Sin Teck Hong Oil Mills Ltd [1950] 16 MLJ 232 ***(dist)***
Perbadanan Nasional Insurans Sdn Bhd v. Pua Lai Ong [1996] 3 MLJ 85 ***(refd)***
Public Bank Bhd v. Berjaya Housing Development Sdn Bhd & Ors [1995] 1 CLJ 237 ***(refd)***
SA Andavan v. Registrar of Titles, Negeri Sembilan & Ors [1977] 2 MLJ 220 ***(refd)***
Re Calgary and Edmonton Land Co Ltd [1975] 1 All ER 1046 ***(refd)***
Re Warbler Pty Ltd [1982] 6 ACLR 526 ***(refd)***
Sri Hartamas Development Sdn Bhd v. MBf Finance Bhd [1991] 3 MLJ 325 ***(foll)***
Ting Yuk Kiong v. Mawar Biru Sdn Bhd (Harry Lee Yew Tong, applicant) [1995] 2 MLJ 700 ***(refd)***
Zamrud Properties Sdn Bhd v. Pang Mooi Gaid & Anor [1999] 5 MLJ 180 ***(refd)***

Legislation referred to:
Companies Act 1965, ss. 4, 243(1)
Companies (Winding-up) 1972, r. 7(1), (2)
Rules of the High Court 1980, O. 41 rr. 1(4), 11

Other source referred to:
Atkin's Encyclopedia of Court Forms

For the petitioner - Saw Kim Hong (JD Ooi with him); M/s Iqbal Hakim Sia & Voo
For the respondent - TS Chang; M/s Henry Soong & Chang
For the supporting creditor - Clarence Edwin; M/s Abdul Rahman Saad & Assoc

Reported by Izzaty Izzuddin

JUDGMENT

Sulong Matjeraie JC:

At encl. 19, there is an application by way of a summons-in-chambers filed by the respondent for the order made by this court for the respondent to be wound up on 12 April 1999 be stayed until determination of the respondent's appeal against the said order. As such all further proceedings be stayed. The application is supported by an affidavit of Mr. Ng Kah Thin affirmed on 20 April 1999 ("the said affidavit") and filed herein at encl. 18.

The petitioner, through their learned counsel, Mr. Benson Ooi Jiun Dar however made preliminary objections on the following grounds:

1. The notice of appeal filed by respondent on 20 April 1999 and the summons-in-chambers dated 26 April 1999 are irregular;
2. The said affidavit is contrary to s. 243(1) of Companies Act 1965 ("of the Act");
3. The said affidavit failed to comply with O. 41 rr. 1(4) and 11 of the Rules of the High Court ("RHC");
4. The summon-in-chambers is *mala fide*.

Ground No 1

It is the submission of the learned counsel for the petitioner that under r. 7(1) of the Companies (Winding-Up) 1972 it says as follows:

> Every application in Court, other than a petition, shall be made by motion and shall be served on the party effected thereby not less than two days before the day named in the notice of hearing of the motion. An application for leave to serve short notice of motion shall be made *ex parte*.

As the word "shall" is used, counsel submitted that the use of notice of motion is compulsory and mandatory. He quoted the case of *Re Sin Teck Hong Oil Mills Ltd* [1950] 16 MLJ 232 where Taylor, J decided that a summons-in-chambers cannot issue except in a pending cause or matter. As the winding-up order had been granted, there is therefore no pending cause, argued the learned counsel.

Further it was submitted that the Atkin's Encyclopedia of Court Forms would suggest that for stay of proceedings, a notice of motion (Form 347) is used. He then quoted the decision of Ajaib Singh, J (as he then was)

in *S.A. Andavan v. Registrar of Titles, Negeri Sembilan & Ors* [1977] 2 MLJ 220 where at p. 225 his Lordship said "Litigation is governed by rule of procedure and no side may take undue advantage over another by side-stepping any rule and it is the duty of the court to ensure that the parties engage themselves in a fair contest." His Lordship observes further at p. 226 that "Parties in civil suits should observe the rules of procedure with meticulous care because a failure to do so may result in irreparable set-backs for them and it is not often that a court will take it upon itself to free the parties from difficulties of their own making and put them on their feet again."

Learned counsel for the respondent Mr. Chang Tau Sian, however said that r. 7(2) of the Companies (Winding-Up) 1972 says as follows:

> Every application in Chambers shall be made by summons in Form 1, which unless otherwise ordered, shall be served on every person against whom an order is sought, and shall require that person or persons to whom the summons is addressed to attend at the time and place named in the summons; and the summons shall be served not less than two days before the day named in the summons, unless in any case it shall be otherwise ordered.

It was submitted by learned counsel for the respondent that the summons in Form 1 is therefore in order. Apart from saying that this application is an application by way of a summons-in-chambers, this court is also of the view that the decision in *Re Sin Teck Hong Oil Mills Limited (supra)* relates to an application to confirm the appointment of a liquidator. Further the authority offered was in respect of a case before the coming in force of the rules on Companies (Winding-Up) Rules 1972.

Ground No 2

It is the submission of the learned counsel for the petitioner that the affidavit in support of Mr. Ng Kah Tin at encl. 18 failed to comply with O. 41 r. 1(4) RHC in that it failed to state the place of residence of the deponent. Order 41 r. 1(4) RHC reads as follows:

> Every affidavit must be expressed in the first person and must state the place of residence of the deponent and his occupation or, if he has none, his description, and if he is, or is employed by, a party to the cause or matter in which the affidavit is sworn, the affidavit must state that fact.

The address of Mr. Ng Kah Thin in the affidavit at encl. 18 was put at No. 2 Kovan Road, #01-02 Simon Plaza, Singapore 548008. This address was admitted to by Mr. T.S. Chang, learned counsel for the respondent, as being the business address of the respondent's company. He alleged

that it was stated there for the convenience of the company in view of the fact that the deponent is affirming the affidavit for and on behalf of the company.

Learned counsel for the petitioner said that this clearly comes in conflict with O. 41 r. 1(4) RHC and quoted the decision of Faiza Tamby Chik J in *Zamrud Properties Sdn. Bhd. v. Pang Mooi Gaid & Anor* [1999] 5 MLJ 180 where at p. 190 his Lordship said "This is a mandatory requirement because of the word "must", as stated in the Court of Appeal case of *Perbadanan Nasional Insurans Sdn. Bhd. v. Pua Lai Ong* [1996] 3 MLJ 85 ... The word 'must' as opposed to 'may' is used in the rule, and we interpret that to mean as implying a peremptory mandate as opposed to a mere direction or discretion as the word 'may' implies. We equate the meaning of the word 'must' as that given to the word 'shall', and for that reason the choice of the word 'must' in the rule does not create the existence of any discretion or empowers the court to exercise any discretion or empowers the court to exercise such discretion.

Further, in the case of *Public Bank Bhd v. Berjaya Housing Development Sdn. Bhd & Ors* [1995] 1 CLJ 237, the court at p. 240, despite holding in the circumstances of the case that the defence by their conduct, had waived their right to object to the defects, notwithstanding stated that (the court) view with concern and do not condone any laxing as to compliance with the rules of procedure regarding affidavits and do not wish to be complacent on such matters."

As such it is their submission that the affidavit of Ng Kah Thin is irregular and does not comply with O. 41 r. 1(4) RHC.

Another matter raised by learned counsel for the petitioner is in respect of para. 27 of the said affidavit which claimed that the respondent company is solvent in that its assets in hand exceed its liabilities. However contrary to O. 41 r. 11 RHC which stipulates that any document to be used in conjunction with an affidavit must be exhibited and a copy thereof annexed to the affidavit. Learned counsel for the petitioner alleged that the respondent failed to comply with this requirement. This court notes that it is true that the relevant exhibits in respect of para. 27 of the said affidavit was not exhibited under that particular paragraph (that is para. 27) but it was in fact exhibited under exh. "N13" under the following para. 28 as well as exh. "N14" as mentioned in para. 29. It would therefore mean that the document is in reality annexed to the affidavit. As the three paras. 27, 28 and 29 of the said affidavit are inter connected this court therefore rejects this part of the submission of the learned counsel for the petitioner.

Ground No 3

It is also the submission of the learned counsel that a director cannot represent the company in an application for a stay of the winding up unless it can be proved to the satisfaction of the court that he comes under one of the categories envisaged under s. 243(1) of the Act.

Section 243(1) of the Act says:

> At any time after an order for winding up has been made, the Court may, on the application of the liquidator or of any creditor or contributory and on proof to the satisfaction of the Court that all proceedings in relation to the winding up ought to be stayed, make an order staying the proceedings either altogether or for a limited time on such terms and conditions as the Court thinks fit.

The terms liquidator or creditor are easily understood but what about contributory? Section 4 of the Act 1965 defined 'contributory' in the following manner:

> "contributory", in relation to a company means a person liable to contribute to the assets of the company in the event of its being wound up, and includes the holder of fully paid shares in the company and, prior to the final determination of the persons who are contributories, includes any persons who alleged to be a contributory.

A number of questions can be posed at this stage and some of them are as follows: Can a director of a company, as in this case, make an application for the winding-up to be stayed? Is it necessary for the said director to show concrete proof to the satisfaction of the court that he is a contributory? Would it be necessary for the said director to state his position in the affidavit as required by s. 243(1) of the Act? Would it be necessary for the said director to get the consent of all the directors before making the application for a stay of the winding-up?

In a well researched case of *Ting Yuk Kiong v. Mawar Biru Sdn. Bhd. (Harry Lee Yew Tong, applicant)* [1995] 2 MLJ 700, Arifin J ruled that "... in order to obtain a stay of the winding-up proceedings, the applicant must convince the court that each member of the company had consented to it. In the present application, although all the directors of the company had given their consent to the application, both the affidavit and the report were silent regarding the members' consent."

Quoting the case of *Re Warbler Pty Ltd* [1982] 6 ACLR 526 his Lordship appended the principles on the granting of a stay of winding-up at p. 705.

In *Re Calgary and Edmonton Land Co. Ltd* [1975] 1 All ER 1046 the Managing Director, who owned 10,000 shares in a company having issued capital of 14 million ordinary shares applied for a stay of the winding-up. He purported to act on behalf of all the shareholders. He stated that he had called two meetings and that the shareholders and unsecured creditors who attended the meetings had voted unanimously for a stay of the winding-up. There was no scheme of arrangement under s. 206 of the 1948 Act, and the views of some of the members had not been ascertained. Communications sent to some of them had been returned undelivered and no attempt had been made to reach them by advertisement. The application for a stay of winding-up by the managing director was dismissed by Megarry J for the following reasons:

> (1) The court would, in normal circumstances, generally exercise its discretion to grant a stay only where the applicant showed (a) that each creditor had either been paid in full or that satisfactory provision for him to be paid in full was to be made, or that he consented to the stay or was otherwise bound not to object to it; (b) that the liquidator's position was fully safeguarded, either by paying him the proper amount of his expenses or sufficiently securing payment; and (c) that each member either consented to the stay, or was otherwise bound not to object to it, or there was secured to him the right to receive all that he would have received if the winding-up had proceeded to its conclusion.

Hashim Yeop A Sani CJ (Malaya) (as his Lordship then was) in a Supreme Court case of *Sri Hartamas Development Sdn. Bhd. v. MBf Finance Bhd* [1991] 3 MLJ 325 dismissed a motion for an order of stay of winding-up order pending disposal of the appeal. The motion was supported by an affidavit by the solicitors of the company which merely stated that as solicitors of the company, they were making the application for stay pending disposal of the appeal. The other ground given for the application for stay was that in actual fact the company had very much more assets than debts, could settle all the debts and was therefore not insolvent. The court was of the view that under s. 243(1) of the Act, after an order for winding up has been made by the court, the application for stay of all proceedings relating to the winding up may be made only by the liquidator or any creditor or contributory. His Lordship added that "thus any other person is not qualified to apply for stay under that section." At p. 327 his Lordship added further that "... it is quite clear that the company has a right to be heard to say that the winding-up order is wrong and to appeal against the order."

In *Rajannan s/o Ravaniah & Ors v. Sivalingam s/o Arumugam Karuppiah* (Civil Appeal No. 02-41-1990) (unreported) the Supreme Court allowed the application for stay. In this case the notice of motion for stay

and the supporting affidavits were filed by the directors and shareholders of Tamil Osai Sdn. Bhd, the company, and they together with the company filed a motion for stay of the winding-up order pending appeal.

It would appear therefore from the provisions of the Companies Act, after a winding up order has been made, an application for stay of the winding-up, may only be made by the liquidator or any creditor or contributory.

Learned counsel for the petitioner submitted that the failure of the respondent to indicate as to whether the deponent was a contributory and that all the members of the company had given their consent to the application inevitably reflect their failure to furnish proof to this court to satisfy the requirement of s. 243(1) Companies Act 1965. He submitted that the respondent have failed to show that they can make this application.

Learned counsel argued that the application is made by the respondent and not by the director or a third party and pointed out that in the cases of *Ting Yuk Kiong (supra)* and *Re Calgary and Edmonton Land Co. Ltd (supra)* the applications were made by a third party and not by the respondent. He referred further to the article entitled *Stay of execution pending appeal in civil litigation* by Mr. Wong Kim Fatt that appeared in the Malayan Law Journal [1999] 1 MLJ 1 at p. 30. Learned counsel further argued that the application for stay can rightfully be sworn by a director of the said company as implicitly the decision in *Sri Hartamas Development Sdn. Bhd.* implies that had the application not been sworn by the solicitor, then it would have been properly before the court. Hence he submitted that if the application was properly brought by the respondent company then the person in the best position to swear a supporting affidavit would be the person acquainted with the running of the company and its office.

Analysing the authorities and after hearing the arguments made, this court is bound by the decision of the Supreme Court (as it then was) in *Sri Hartamas Development Sdn. Bhd. v. MBf Finance Bhd (supra)* whereby it is clearly stated that "... after an order of winding up has been made by the court, the application for stay of all proceedings relating to the winding up may be made only by the liquidator or any creditor or contributory." But it is quite clear that the company has a right to be heard to say that the winding up order is wrong and to appeal against the order. It is not disputed that in this instant case that the winding-up order was made on 12 April 1999.

Following the decision of the Supreme Court (as it then was) in an unreported case of *Rajannan s/o Ravaniah & Ors v. Sivalingam s/o Arumugam Karuppiah* quoted in *Sri Hartamas Development Sdn. Bhd. v. MBf Finance Bhd.*, it would appear that unless the applicant is a liquidator or a creditor, the notice of motion for stay would need to be supported by affidavits filed by directors, shareholders and the company. For good measure it would also be prudent to confirm that they are contributories in order to comply with s. 243(1) of the Act.

In view of the above analysis the argument by the learned counsel for the respondent could not be accepted.

In the event that this court is wrong in not accepting the arguments of the learned counsel for the respondent, then because of the admission of the said counsel that the address of Ng Kah Thin stated in the said affidavit is a business address of the respondent company and not his residential address, this is therefore an unfortunate departure from O. 41 r. 1(4) RHC where the word "shall" appearing therein have been interpreted to imply a peremptory mandate where no discretion could be exercised by this court. The end result is that the said affidavit of Mr. Ng Kah Thin could not be accepted. Therefore the application by way of summon in chambers at encl. 19 has no supporting affidavit.

In the circumstances, the preliminary objection on the above point is therefore allowed and the summons-in-chambers at encl. 19 is dismissed with costs.